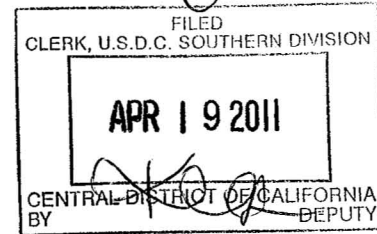


I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL *Petitioner*
(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF
RECORD IN THIS ACTION ON THIS DATE.

DATED: 4/19/2011
[Signature]
DEPUTY CLERK



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PHILLIP JOSEPH,

Petitioner,

vs.

DOMINGO URIBE, JR.,

Respondent.

Case No. SACV 11-541-AHS (RNB)

ORDER SUMMARILY DISMISSING
PETITION FOR WRIT OF HABEAS
CORPUS FOR LACK OF SUBJECT
MATTER JURISDICTION

On April 7, 2011, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody herein. Petitioner purports to be making various challenges to his sentence, including a sentencing error claim based on the Supreme Court's 2007 decision in Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007).

It appears from the face of the Petition that it is directed to the same judgment of conviction as the prior habeas petition filed by petitioner in this Court on May 17, 2000, in Case No. SACV 00-467-AHS (SGL). On December 24, 2002, Judgment was entered in Case No. SACV 00-467-AHS (SGL) denying the petition and dismissing the action with prejudice. Petitioner filed an appeal from that Judgment, but his requests for a certificate of appealability were denied in turn by this Court and the Ninth Circuit.

1 The Petition now pending is governed by the provisions of the Antiterrorism
2 and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214) ("the
3 Act"), which became effective April 24, 1996. Section 106 of the Act amended 28
4 U.S.C. § 2244(b) to read, in pertinent part, as follows:

5 (1) *A claim presented in a second or successive habeas corpus*
6 *application under section 2254 that was presented in a prior*
7 *application shall be dismissed.*

8 (2) *A claim presented in a second or successive habeas corpus*
9 *application under section 2254 that was not presented in a prior*
10 *application shall be dismissed unless--*

11 (A) *the applicant shows that the claim relies on a new*
12 *rule of constitutional law, made retroactive to cases on collateral*
13 *review by the Supreme Court, that was previously unavailable; or*

14 (B)(i) *the factual predicate for the claim could not have*
15 *been discovered previously through the exercise of due diligence;*
16 *and*

17 (ii) *the facts underlying the claim, if proven and viewed*
18 *in light of the evidence as a whole, would be sufficient to*
19 *establish by clear and convincing evidence that, but for*
20 *constitutional error, no reasonable factfinder would have found*
21 *the applicant guilty of the underlying offense.*

22 (3) (A) *Before a second or successive application permitted*
23 *by this section is filed in the district court, the applicant shall*
24 *move in the appropriate court of appeals for an order authorizing*
25 *the district court to consider the application.*

26 . . .

27 (C) *The court of appeals may authorize the filing of a*
28 *second or successive application only if it determines that the*

1 *application makes a prima facie showing that the application*
2 *satisfies the requirements of this subsection.*

3 ...

4 (4) *A district court shall dismiss any claim presented in a*
5 *second or successive application that the court of appeals has*
6 *authorized to be filed unless the applicant shows that the claim satisfies*
7 *the requirements of this section.*

8
9 The Petition now pending constitutes a second and/or successive petition
10 challenging the same judgment of conviction as petitioner's prior habeas petition in
11 Case No. SACV 00-467-AHS (SGL), within the meaning of 28 U.S.C. § 2244(b).
12 Thus, to the extent that petitioner is now purporting to raise sentencing error claims
13 previously raised in Case No. SACV 00-467-AHS (SGL), § 2244(b)(1) compels
14 dismissal of those claims.

15 To the extent that petitioner is now purporting to raise any new sentencing
16 error claims, it was incumbent on him under § 2244(b)(3)(A) to secure an order from
17 the Ninth Circuit authorizing the District Court to consider the Petition, prior to his
18 filing of it in this Court. See Cooper v. Calderon, 274 F.3d 1270, 1275 (9th Cir.
19 2001), cert. denied, 538 U.S. 984 (2003). Such permission will be granted only if
20 “the application makes a prima facie showing that the application satisfies the
21 requirements of [Section 2244(b)].” See id. Only after the Circuit has made the
22 initial determination that the petitioner has made a prima facie showing under §
23 2244(b)(2) does the district court have any authority to consider whether the
24 petitioner has, in fact, met the statutory requirements of § 2244(b). Under §
25 2244(b)(4), the petitioner must make “more than another prima facie showing” in the
26 district court; the “district court must conduct a thorough review of all allegations and
27 evidence presented by the prisoner to determine whether the [petition] meets the
28 statutory requirements for the filing of a second or successive petition.” See United

1 States v. Villa-Gonzalez, 208 F.3d 1160, 1164-65 (9th Cir. 2000).

2 Since petitioner's prior petition in Case No. SACV 00-467-AHS (SGL) was
3 denied on the merits, this case is distinguishable from the other cases in which
4 permission from the Circuit to file a subsequent petition has been found unnecessary.
5 For example, the Petition now pending does not raise a claim raised in a prior petition
6 that was dismissed without prejudice as unexhausted. See Slack v. McDaniel, 529
7 U.S. 473, 487, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Nor does it raise a claim
8 raised in a prior petition that was dismissed without prejudice as premature. See
9 Stewart v. Martinez-Villareal, 523 U.S. 637, 644-45, 118 S. Ct. 1618, 140 L. Ed. 2d
10 849 (1998).

11 While it does not appear to the Court that petitioner can make the requisite
12 showing that any of his sentencing error claims "relies on a new rule of constitutional
13 law, made retroactive to cases on collateral review by the Supreme Court, that was
14 previously unavailable," that is a determination for the Ninth Circuit to make in the
15 first instance. Petitioner's failure to secure an order from the Ninth Circuit
16 authorizing the District Court to consider any new sentencing error claims being
17 alleged in the Petition now pending, prior to his filing of the Petition in this Court,
18 deprives the Court of subject matter jurisdiction.¹ See Cooper, 274 F.3d at 1274.

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26 ¹ The Court notes that this is the second successive habeas petition filed
27 by petitioner. On August 25, 2008, Judgment was entered in Case No. SACV 08-
28 882-AHS (RNB), summarily dismissing that action for lack of subject matter
jurisdiction.

1 IT THEREFORE IS ORDERED that this action be summarily dismissed
2 pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States
3 District Courts.

4 LET JUDGMENT BE ENTERED ACCORDINGLY.

5
6 DATED: APR 18 2011

7
8 
9 ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

10 Presented by:

11 
12 Robert N. Block
13 United States Magistrate Judge
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